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No. 94-1039

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN AND THE CITY COUNCIL OF ASPEN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF OF THE CITIES OF ATLANTA, BALTIMORE, BOSTON, LOS ANGELES, MADISON, NEW YORK, PORTLAND, SAN FRANCISCO, SEATTLE AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae – the cities of Atlanta, Baltimore, Boston, Los Angeles, Madison, New York, Portland, San Francisco, Seattle, and the National Institute of Municipal Law Officers (NIMLO), submit this brief in support of respondents Richard Evans, *et al.* Municipal Amici submit this brief pursuant to Supreme Court Rule 37.5. NIMLO's participation is authorized by the consent of the parties pursuant to Supreme Court Rule 37.3. Written consent for NIMLO's participation, from the counsel of record for each party, is on file with the Clerk of the Supreme Court. Amici are collectively referred to here as "the cities."

This case concerns whether Amendment 2 to the Colorado Constitution, Colo. Const. art. II, §30 (1992) ("Amendment 2"), violates the Equal Protection Clause of the Fourteenth Amendment. Amendment 2 forbids all of Colorado's state and local governments from adopting or enforcing any law or policy that allows any person to seek redress for discrimination on the basis of gay, lesbian, or bisexual orientation.

The cities have a direct interest in the resolution of this question. All of the cities have adopted anti-discrimination ordinances or policies that seek to protect individuals from invidious discrimination and mistreatment and to promote respect and equal rights for all members of society. In each named amicus city, these protections include some form of prohibition against discrimination based on sexual orientation. Several of the cities are located in states where measures similar to Amendment 2 are being considered. (Pet. Cert. at 20.)

Petitioners Roy Romer as Governor and the State of Colorado have argued that a state may amend its constitution to forbid state and local governments from adopting or enforcing any policy that prohibits discrimination against any disfavored group, so long as the group has not been determined to be a suspect class under equal protection analysis. None of the named cities have limited the protection of their local anti-discrimination ordinances and policies to suspect classifications. The cities have adopted ordinances and policies that prohibit discrimination based upon, for example, age, physical and mental disability, veterans' status and marital status. If petitioners' view prevails, the cities' efforts to combat discrimination based on all arbitrary, status-based characteristics of concern to local citizens would be in jeopardy.

The National Institute of Municipal Law Officers (NIMLO) is a non-profit, non-partisan organization, consisting of over 1400 local governments and their attorneys. Member governments operate NIMLO through their chief legal officers, variously called city or county attorneys, corporation counsel, city solicitors, law directors, and other titles.

NIMLO is dedicated to gathering and disseminating information on recent legal developments that affect municipalities. NIMLO participates in a case in an amicus capacity when a majority of the Board of Directors determines that the case has nationwide impact and amicus support is warranted. In this case, NIMLO is concerned about the effect of state initiatives on local authority to protect human rights.

SUMMARY OF ARGUMENT

Amendment 2 adopts as state policy a governmental objective that is impermissible under the Equal Protection Clause. The provision creates a state constitutional privilege to discriminate against gay, lesbian, and bisexual persons in every conceivable area of public and private life. Such a policy is directly contrary to the basic purpose of the Equal Protection Clause – to ensure that similarly situated persons shall be similarly treated under the law.

ARGUMENT

AMENDMENT 2 FACIALLY VIOLATES THE EQUAL PROTECTION CLAUSE.

The Colorado Supreme Court strictly scrutinized Amendment 2. *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994) ("Evans II"); *see also, Evans v. Romer*, 854 P.2d 1270, 1286 (Colo.), *cert. denied*, 114 S.Ct. 419 (1993) ("Evans I"). The court reasoned that Amendment 2 burdens the fundamental right to political participation. Amici agree. This basis of decision has been well discussed and developed in other briefs.

The cities believe the decision of the Colorado Supreme Court is correct for another reason of particular concern to local governments. Even under a rational basis test, Amendment 2 is invalid because it purports to create a privilege to discriminate which sweeps so broadly that it bears no rational relationship to any conceivable objective that government may legitimately pursue. Thus, the Court

need not consider whether Amendment 2 involves a suspect classification or burdens a fundamental right in order to find Amendment 2 unconstitutional.

The Equal Protection Clause protects all persons from arbitrary discrimination – not just members of racial and ethnic minorities. *See, Yick Wo v. Hopkins,* 118 U.S. 356, 368-69 (1886). The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216 (1982)).

Amendment 2 is unconstitutional on its face because it adopts a substantive state policy that contradicts this fundamental direction. Amendment 2 creates a positive power and privilege to discriminate against gay, lesbian and bisexual individuals solely on the basis of prejudice. Amendment 2 declares Colorado policy that *no* gay, lesbian, or bisexual person shall *ever* be considered to be similarly situated to *any* heterosexual person with respect to *any* power, right or privilege – whether public or private. This policy cannot coexist with the mandate of equal protection that governmental classifications be rationally related to a permissible governmental objective.

A. AMENDMENT 2 CREATES A STATE CONSTITUTIONAL PRIVILEGE TO DISCRIMINATE THAT STATE AND LOCAL OFFICIALS ARE POWERLESS TO CONTROL.

Petitioners profoundly mischaracterize the scope and effect of Amendment 2 in at least two respects. First,

petitioners argue that Amendment 2 merely repeals previously adopted statutes, ordinances and policies that prohibited discrimination based on sexual orientation. (Pet. Brf. at 6.) Petitioners assert that gay, lesbian and bisexual individuals "would retain precisely the same rights under state and federal law that they had prior to the enactment of the special protections repealed by Amendment 2." (*Id.*) According to the petitioners, gay, lesbian and bisexual individuals in Colorado stand in the same shoes today as they did before the adoption of anti-discrimination laws that specifically mention sexual orientation.

Second, petitioners argue that Amendment 2 merely preempts local anti-discrimination measures. (Pet Brf. at 9-10.) Petitioners argue that respondents are seeking "to immunize from preemption special protections that have been conferred upon homosexuals and bisexuals." (*Ibid.*) Thus, petitioners defend Amendment 2 as involving only a state allocation of authority among political subdivisions. (*Id.* at 14.) *See also,* Brief of Amici Curiae States of Alabama, California, et al. at 8 (states can grant and withdraw powers to local governments at their pleasure).

Petitioners disregard the plain text – and the extraordinarily broad reach – of Amendment 2:

> *Neither the State of Colorado,* through any of its branches or departments, *nor any of its* agencies, political subdivisions, *municipalities* or school districts, *shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexuals, lesbian or bisexual orientation,* conduct, practices or relationships *shall* constitute or otherwise *be the basis of,* or entitle any person or

> class of persons to have or claim *any* minority status, quota preferences, protected status or *claim of discrimination*. This Section of the Constitution shall be self-executing.

Amendment 2 (emphasis added).[1]

Amendment 2 goes far beyond repeal and preemption of anti-discrimination policies.[2] Amendment 2 purports to install a privilege to discriminate against gay, lesbian and bisexual individuals as a substantive policy on equal footing with the other individual liberties secured by Colorado's constitution. This Court considered a similar, though significantly narrower measure, in *Reitman v. Mulkey*:

> The right to discriminate . . . [is] now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing . . . discrimination need no longer rely solely

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[1] The Colorado Supreme Court based its holding on Amendment 2's provisions regarding gay, lesbian, or bisexual *orientation*, not Amendment 2's additional prohibition of protections arising from "homosexual, lesbian, or bisexual . . . conduct, practices or relationships." This brief thus focuses on Amendment 2's prohibition of claims of discrimination based on sexual orientation.

[2] This Court must consider Amendment 2 and its effects in their entirety. The Colorado Supreme Court struck down Amendment 2 as a whole because the court concluded that the measure's provisions were not severable as a matter of state law. *Evans* II, 882 P.2d at 1349. Given this decision of state law by Colorado's highest court, this Court has not been asked whether certain of Amendment 2's provisions as applied in certain circumstances could withstand equal protection scrutiny.

> solely on their personal choice. They [may] now invoke the express constitutional authority, free from censure or interference of any kind from official sources.

387 U.S. 369, 377 (1967) (holding the creation of such authority unconstitutional, even where it authorizes only private acts of discrimination in housing).

Amendment 2's effect of endorsing and immunizing *public* discrimination, no matter how invidious or arbitrary, is particularly egregious. Even in the absence of specific legislative authorization, state and local officials normally have the power and the duty to prevent subordinate public employees from acting arbitrarily. For example, a local director of public health would need no legislative guidance to discipline an employee who refuses to inoculate left-handed children.

Administrative decisions based solely on prejudice against gay, lesbian or bisexual individuals are equally arbitrary. Amendment 2 prevents administrators from proscribing this form – and only this form – of arbitrary action. The effects of this policy would be felt across a virtually limitless range of local government responsibilities.

A single example easily illustrates the hopeless bind in which Amendment 2 would place local governments. Suppose that an employee of the local library who processes applications for library cards refuses to provide library cards to gay, lesbian or bisexual patrons because the employee does not want to encounter these persons in the public library. An applicant complains to the city that it has discriminated against her because she was told

she could not have a library card because she is a lesbian. City policy establishes that the mission of the public library is to make information widely available to members of the public.

Nevertheless, Amendment 2 would prevent the city from disciplining the library employee. Such discipline would "enforce [a] policy whereby . . . lesbian . . . orientation [would] be the basis of . . . any . . . claim of discrimination." Amendment 2. Worse, the city librarian could not issue a directive that staff may not take sexual orientation into account when issuing library cards. Such a directive would violate the state constitution by creating a policy protecting against discrimination based on sexual orientation.

Under well-settled equal protection precedents, the library patron's right to equal application of the laws has been violated. If any public function is "administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" the government has denied equal protection of the laws. *Yick Wo*, 118 U.S. at 373-74. Although *Yick Wo* involved a classification that would today be described as "suspect," its proscription of arbitrary governmental conduct remains in force in the requirement that all classifications *at least* be rationally related to a legitimate governmental interest. *See, Cleburne*, 473 U.S. at 448.

There is no conceivable basis for arguing that lesbian and heterosexual citizens are not similarly situated with respect to routine access to institutions such as the public

library. Under *Yick Wo*, even isolated instances of arbitrary treatment are unconstitutional. It necessarily follows that a state may not enshrine in its constitution a positive privilege for its employees to discriminate with impunity in the performance of their duties. Our institutions of government "do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 369-70. Accordingly, the state may not mandate that governmental entities do nothing to prevent such arbitrary treatment by their agents.

Thus, contrary to petitioners' assertions, Amendment 2 dramatically changes the *status quo* prior to the adoption of positive prohibitions on discrimination based on sexual orientation.[3] Amendment 2 seeks to affirmatively disable any instrumentality of Colorado state or local government from prohibiting or penalizing arbitrary action or invidious discrimination, even where it is undisputedly based solely on prejudice, so long as the facts surrounding the act of discrimination involve the complainant's gay, lesbian, or bisexual orientation. This situation presents an extreme case of what the Court proscribed in *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984): "Private biases may be

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[3] The cities agree that neither states nor their subdivisions are required to legislate against discrimination at all, and that governments are free to repeal such protections once extended. Amendment 2 is not protected by these principles because it *disables* governments from extending such protections to a single class of individuals based on their status alone rather than on some neutral principle. The Equal Protection Clause, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me," *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. 261, 300 (1990) (Scalia, J. concurring), does not tolerate such a measure.

outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (Quoted in *Cleburne*, 473 U.S. at 448.) Amendment 2 seeks to *compel* governments to give effect to the biases of their own employees. Where such employees have been vested with significant discretion, their authority to employ bias arbitrarily is particularly pernicious.

The result is to place government agencies in an impossible bind. By complying with Amendment 2, a state or local government entity would, in many instances, expose itself to liability under the Equal Protection Clause for arbitrary and invidious discrimination. By complying with the mandates of the Equal Protection Clause, a state or local government entity would expose itself to liability under Amendment 2 from public employees or others seeking to defend their right to discriminate. The Supremacy Clause resolves this conflict. Amendment 2 violates the United States Constitution.

B. AMENDMENT 2 IS NOT RATIONALLY RELATED TO A PERMISSIBLE GOVERNMENTAL OBJECTIVE.

Under the rational basis test, a legislative classification is entitled to deference and is generally sustained if it is rationally related to a legitimate governmental interest. *Cleburne*, 473 U.S. at 440. Nevertheless, a classification is invalid where it furthers only an impermissible purpose. The Court's usual presumption that the democratic process will eventually rectify improvident decisions

only applies *"absent some reason to infer antipathy." Vance v. Bradley*, 440 U.S. 93, 97 (1979), *quoted in FCC v. Beach Communications*, 508 U.S. ___, 113 S. Ct. 2096, 2101 (1993) (emphasis added).

"[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (requirement that all household members be related creates irrational classification where motivated by illegitimate purpose of preventing "hippies" from participating in food stamp program).[4]

"If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality [is] suspect." *Cleburne*, 473 U.S. at 452 n.4 (Stevens, J. & Burger, C.J., concurring); *see also, Wayte v. United States*, 470 U.S. 596, 608 n. 10 (1985) (showing of discriminatory intent unnecessary where equal protection claim based on overtly discriminatory classification). Here, the text of Amendment 2 itself displays antipathy toward gay, lesbian or bisexual people and declares its core purpose to impact adversely the disfavored class. Amendment 2

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[4] It is of no consequence that Amendment 2 was adopted by the voters rather than a representative legislature. "[T]he electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause." *Cleburne*, 473 U.S. at 448; *see also, Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964). Indeed, the "Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy." *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

deprives gay, lesbian and bisexual individuals of protection from discrimination based on sexual orientation while retaining such protection for heterosexual people. Amendment 2; *see also, Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (majority needs no protection from discrimination).

Furthermore, petitioners have not contested the Colorado Supreme Court's conclusion that imposing an adverse impact on gay, lesbian, and bisexual people was the declared purpose of Amendment 2:

> Amendment 2 *sought to deny an independently identifiable group's right to participate equally in the political process*. . . . ¶ . . . Amendment 2 also *is intended to deny the same right* to persons based on 'homosexual, lesbian, or bisexual . . . conduct, practices, or relationships. . . . '

Evans II, 882 P.2d at 1349 (emphasis added). The legislative history confirms this purpose. The Colorado legislative council's analysis of Amendment 2 informed voters that gay, lesbian and bisexual persons experienced discrimination in many contexts, including employment, housing, public accommodations, health care, and education. (Pet. Cert. App. F-3.) Several agencies of state and local government had thus recognized a need to protect gay, lesbian and bisexual individuals from discrimination based on their sexual orientation. (Pet. Cert. App. F-3 through F-6.) Voters were informed that if Amendment 2 passed, it would nullify these protective policies and state and local governmental officials would have no

power to adopt or enforce similar policies. *See, Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J. concurring) (what actually happened is best evidence of discriminatory intent).

Normally, where the record reveals that a classification is motivated by an illegitimate purpose, the Court reviews other proffered purposes to ensure that impermissible objectives were not the *only* reason for the classification. *See, Cleburne*, 473 U.S. at 448-450. Here, however, the universal reach of the antipathy codified in Amendment 2 makes such review unnecessary.

Amendment 2's blanket endorsement of discrimination, even where it is based solely on prejudice, makes it unlike measures previously considered by this Court. The Court's equal protection jurisprudence has principally addressed classifications alleged to burden the exercise of particular rights in particular contexts. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (limiting veterans' tax exemption based on duration of residency); *Zobel v. Williams*, 457 U.S. 55 (1982) (restricting distribution of government funds based on length of residency); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (restricting distribution of government benefits based on household membership); *Gordon v. Lance*, 403 U.S. 1 (1971) (requiring referendum to incur bonded indebtedness or increase taxes); *James v. Valtierra*, 402 U.S. 137 (1971) (requiring referendum to approve low-income housing); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (limiting voting eligibility for school board members to parents and property owners); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (authorizing private discrimination in housing). By contrast, Amendment 2 adopts a *blanket*

endorsement of discrimination in every arena of social life.

Because of Amendment 2's universal reach, the Court need not decide whether gay, lesbian or bisexual orientation can be a legitimate basis for some governmental decisions. *No conceivable purpose* could legitimately justify a *global* policy affirming discrimination in all matters. This is true whether the policy classifies individuals based on sexual orientation, residency, pregnancy, native language, intelligence, age, disability, or any other personal characteristic that does not trigger strict scrutiny. "The state's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring). A universal policy affirming or even tolerating discrimination, even where it is based solely on prejudice, can have no such basis. It is fundamentally at odds with the Equal Protection Clause.

CONCLUSION

For all the reasons set forth above, the judgment of the Colorado Supreme Court should be affirmed.

Dated: June 19, 1995

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